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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 545.

FRED SCHROEPFER, CHARLES R. SCHROEPFER, AND ABRAHAM BERRY,
Petitioners,

vs.

THE A. S. ABELL COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

EDWIN F. A. MORGAN,
WILLIAM D. MACMILLAN,
Counsel for Respondent.

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SUBJECT INDEX

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported in 48 Fed. Supp. 88. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 138 Fed. (2d) 111.

JURISDICTION

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec.

347). Judgment of the Circuit Court of Appeals was entered on September 16, 1943. The petition for the writ of certiorari was filed December 16, 1943.

STATEMENT OF THE CASE

The petitioners sued respondent under the Fair Labor Standards Act (29 U. S. C. A. 201-219) to recover alleged unpaid over-time compensation accounting from October 25, 1938, the date this Act became effective, up to January 19, 1942, at which latter date their business relations with the respondent were terminated. Subsequent thereto when they entered suit under the Act they necessarily claimed (1) that they had been employees and (2) as such employees were engaged in interstate commerce, and (3) that from October 25, 1938 to January 19, 1942 they were not paid in accordance with the provisions of this Act. These claims were denied by the respondent in its answer and on the evidence produced the District Court, sitting as a jury, held (48 Fed. Supp. 88):

(1) the plaintiffs were not employees of the defendant within the scope and meaning and operation of this Act;

(2) the plaintiffs were not employed in interstate commerce or in the production of goods for commerce within the meaning of the Act, and

(3) the complaint should be dismissed.

ISSUES PRESENTED

There are, therefore, two questions at issue, namely:

1. Were the Petitioners employees of Respondent within the meaning of the Fair Labor Standards Act?

2. Were the Petitioners engaged in Interstate Commerce within the meaning of the Act?

If either of these issues is answered in the negative, then the Petitioners' case must fail and the petition should be denied.

ARGUMENT

1. The Petitioners Were Not Employees of Respondent Within the Meaning of the Act.

Such was the finding of the District Court. However, the Circuit Court of Appeals held (138 Fed. (2d) 111):

> "The facts bearing on the issue as to whether or not the plaintiffs were employees of defendant are voluminous and complicated and are fully and fairly stated in the opinion below. Whether upon these facts plaintiffs were employees of defendant within the meaning of the act, is a question not free from difficulty (*Cf. Southern R. Co. v. Black*, 4 Cir., 127 F. 2d 280), but it is one which it is not necessary for us to decide, since we are of opinion that, even if considered employees of defendant, plaintiffs were not engaged in commerce within the meaning of the act."

The Finding That Petitioners Were Not Employees Is Supported By Substantial Evidence.

Upon the weight of the testimony the Trial Judge found that the petitioners were not employees of the respondent. There was sufficient and substantial evidence to support this finding, as an examination of the transcript and of the District Court's findings of fact will demonstrate. A few of the pertinent facts as shown in the Transcript, justifying the ultimate finding that the petitioners were not employees, are as follows:

1. "The Schroepfers were known in the business as rackmen. Their relations with the defendant * * * existed for several years prior to October 24, 1938, when the Fair Labor Standards Act became effective. Each had a separate territory for the distribution and sale of newspapers. Their activities consisted in the delivery of the several successive editions of the daily newspapers to the street-corner vending machines and of the Sunday papers to some stores in their respective territories. The vending machines were in the general form of metal racks placed on various street-corners, holding a number of copies of papers, with a receptacle under lock and key for the deposit of coins to be made by the purchasers of the papers. The rack-men, of whom there were about fourteen for Baltimore City, collected the money daily from the vending machines. They were entitled to retain or be credited with the whole of the money so collected." (Petitioners admit the foregoing to be true. See their brief in C. C. A. at pp. 3-4.)

2. The rack-men purchased the papers at wholesale rates and sold them at retail rates, keeping the difference for themselves. (Tr. 28.)

3. The racks or vending machines were owned by the Company but rented to the rack-men, who paid a weekly rack rental. The rack-men were not paid a salary as such but were given a car allowance on account of expenses for their operation thereof. (Tr. 63, 218, 300, 161-164, 183, 185, 217-221.)

4. The respondent did not interfere with or control in any way the activities of the petitioners in the distribution of papers to the vending machines. (Tr. 186, 306, 312.)

5. The rack-men directly employed and paid such helper or helpers as they needed or required for their activities without the knowledge or previ-

ous authority of the respondent. They could take for resale more or less papers for each edition provided their territory was properly serviced. (Tr. 74, 101, 265, 311.)

6. The respondent did not treat the petitioners as employees. It carried group insurance for its employees but the petitioners were not included. They were not carried on any of the books or records of the Company as employees or credited thereon with any salary or services. The respondent's employees were given annual vacations with pay but this did not include the rack-men. (Tr. 111, 176, 285.)

7. The petitioners were not required to give the operation their personal attention, but could and did themselves appoint substitutes, whenever they saw fit to do so, to handle their affairs. (Tr. 101, 132, 177.)

8. There was no means available to the respondent whereby it could control the number of hours of work performed by the rack-men and they alone determined how much time they would spend themselves or through a substitute or helper. (Tr. 132, 137, 175, 186, 276.)

It was contended by respondent below, as it is now, that under Rule 52(a) of the Federal Rules of Civil Procedure, providing that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opinion of the Trial Court to judge the credibility of the witnesses," the burden rested upon the petitioners to prove that the findings by the District Court, sitting as a jury, were clearly erroneous. The petitioners have not met this burden and the Circuit Court of Appeals refused to set aside the District Court's findings of fact. The petitioners now seek to have this

Court review the evidence upon which the District Court made its findings and to decide disputed questions of fact, which, we submit, was the proper function of the trial Court only.

2. The Petitioners Were Not Employed In Interstate Commerce.

In affirming the District Court on this finding the Circuit Court did so, as its opinion shows, in conformity with previous decisions of this Honorable Court.

The petitioners state, as the principal reason for the granting of the writ, that the decision of the Circuit Court of Appeals in the instant case is probably in conflict with the applicable decisions of this Honorable Court and they cite, in support of this allegation, the cases of *Overstreet v. North Shore Corporation*, 318 U. S. 125, and *Walling v. Jacksonville Paper Company*, 317 U. S. 564.

In the *Overstreet case*, the employees in question were respectively engaged (1) in raising a draw bridge for the passage of boats engaged in interstate commerce and lowering it for the resumption of traffic over an interstate arterial highway, (2) in maintenance and repair work on the road and bridge and (3) in selling and collecting toll tickets from "vehicles using said road in interstate commerce."

Obviously the facts in the *Overstreet Case, supra*, are not analogous to the facts in the instant case. Nor are the facts in the *Pedersen case*, 318 U. S. 740, also cited by petitioners, analogous here.

In the *Jacksonville Paper Company* case the Court held that:

(1) the Act *was applicable* to employees at branch warehouses of wholesale distributor of paper products receiving major portion of its products from out of state where substantial part of activities relate to shipments, on special prior orders of customers, which stop at warehouses only for checking, or to deliveries of goods obtained by wholesaler pursuant to understanding with customer to meet its needs.

(2) the Act was *not applicable* to employees where substantial part of activities relate to filling orders from warehouse when there is no prior contract, order or understanding.

(3) All phases of wholesale business selling intrastate are not covered by Act solely because purchases are made interstate.

It is of importance to note what this Court said in *McLeod vs. Threlkeld*, — U. S. —, 63 S. Ct. 1248:

> "Our question is whether he was 'engaged in commerce'. We have held that this clause covered every employee in the 'channels of interstate commerce', Walling v. Jacksonville Paper Co., No. 336, October Term 1942 (6 WHR 81), as distinguished from those who merely affected that commerce. So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not."

The newspapers made available to the rack men, who purchased the same for resale at the racks or vending machines at the street corners, were for local disposition to whomsoever might purchase them and without a prior order from anybody. This fact is beyond any dispute.

Therefore, even if the newspapers in this case were imported in final form from another state, as goods were in the *Jacksonville* case and the case of *Higgins vs. Carr Bros., infra*, the handling thereof by the rack men for mere local distribution and not pursuant to a previously given order, would not constitute interstate, but merely an intrastate, activity.

Moreover, it is to be noted in the *Jacksonville* case that there is no change, or processing of, the goods in question, that the goods merely came temporarily to rest for the purpose of checking and then continued their journey on to those who have ordered them.

In the instant case, the Respondent receives its newsprint, its ink, its special features and a very large part of its news items from out the State. It then takes all of these items, together with others, and makes or manufactures a newspaper. A comparatively small percentage of the manufactured article, namely the newspaper, is distributed outside the State. Over ninety per cent. of the newspaper is distributed in this State and of the amount so distributed, a relatively small part was sold to the petitioners and other rackmen who in turn re-sold it to the public in Baltimore City.

The difference between this case and the *Overstreet* and *Jacksonville Paper Company* cases is, therefore, obvious. The same distinction is equally obvious between the instant case and *Western Union Telegraph Company v. Foster*, 247 U. S. 105, in that in that case there were predetermined or existing customers, namely brokers, and the Western Union Company was merely a conduit which passed on to these customers the quotations furnished to it.

The instant case is much more similar to the case of *Higgins v. Carr Bros, Co.*, 317 U. S. 572, not cited by the petitioners, wherein a wholesaler of fruit, groceries and produce in Portland, Maine, bought its merchandise from local producers and from dealers in other states, had it delivered by truck and rail, unloaded it into its store and warehouse and from there sold and distributed it to the retail trade in the State of Maine only. Some of the produce was processed and much of it was sold in the condition in which it was received. The wholesaler owned all of its merchandise, made its own deliveries and made no sales on commission nor on order with shipments direct from the dealer or producer to the retail purchaser. The employee in question worked as a night shipper in putting up orders and loading trucks for delivery to the retail trade in Maine or driving a truck distributing the merchandise to the local trade. The Court said that there was nothing to impeach the accuracy of the conclusion of the Supreme Judicial Court of Maine that when the merchandise coming from without the State was unloaded at Respondent's place of business its "interstate movement had ended."

So here where the various elements, including items of news, arrived at the newspaper company's office and were made into a newspaper the interstate character of these elements came to an end and one engaged in the delivery in local trade of the processed article was not engaged in interstate commerce within the meaning of the Fair Labor Standards Act.

We think it pertinent at this point to quote from Judge Chesnut's findings as follows:

> "The evidence shows that they had no part, however small, in the manufacture or production of the

> defendant's newspaper, either physically or by a necessary relation. Nor did they touch in any way the distribution of newspapers outside of Baltimore City and its immediate environs."
>
> "There could hardly be a more purely intrastate activity than the sale of newspapers in a particular small part of a large city, especially where the newspaper is locally produced in the same city."

It appears from the petition (p. 3) and supporting brief (p. 19, etc.) that petitioners' argument on the commerce question amounts to this: Since the respondent was admittedly engaged in interstate commerce and in the production of goods for commerce, therefore the petitioners must have been engaged likewise.

However, such is not the law. In *Overstreet v. North Shore Corp.*, 318 U. S. 125, one of the two cases relied upon principally by the petitioners, it was stated by this Court:

> "The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities."

The petitioners also cite *Hearst Publication, et al. v. National Labor Relations Board*, 136 Fed. (2d) 608 (9 C. C. A.) now pending in this Court. This case is entirely inapplicable to the instant case in that there the Court was construing the National Labor Relations Act, whereas in the instant case the Fair Labor Standards Act is involved and this Court has repeatedly pointed out the difference in scope and coverage between the two Acts. Furthermore, the petitioners' interpretation of the quotation from that case on page 22 of its supporting brief, is misleading as appears from the very next sentence of the opinion of the Ninth Circuit, as follows:

> "It seems likewise clear that a disturbance in the street sales distribution of any one of these metropolitan dailies would materially *affect* the whole business and a fortiori would *affect* the free flow of interstate commerce. (Italics supplied).

An examination of the petitioners' argument on the commerce question shows that they rely heavily upon the contention, as stated in their brief at page 21, that "it is unquestionably true that if the distribution of the paper was suddenly stopped, the very life of respondent's business would be jeopardized, etc." The facts in this record are to the contrary, as evidenced by the findings of Judge Chesnut, viz:

> "The factual contention that the Schroepfers were performing a part of the newspaper enterprise essential to the whole is seemingly clearly refuted by the fact in this case that the defendant terminated the whole system of sales by rack-men through vending machines, rather than yield to a ruling recommended by the Local Director to the Administrator of the Act. The evidence does not show what, if any, substitute has been adopted by the defendant to replace sales of papers through vending machines, but there is no suggestion that the abandonment of the vending machines has impaired the success of the newspaper enterprise."

3. No Important Federal Question Is Involved.

As to petitioners' other contention, namely, that a writ should be granted because an important question of Federal law is involved, petitioners have wholly failed to show that the so-called rack or vending machine system was ever anything but a system applicable to Baltimore City; and as a matter of undisputed fact, it appears (Tr. 166-168) that the Respondent installed the system only

in 1930 and abandoned it in January 1942, as pointed out above. There has also been no showing by the petitioners that there were any other persons engaged elsewhere who were likely to be affected by the decision in this case. In consequence a decision in this case is of very limited local importance.

CONCLUSION

We submit that the petitioners have totally failed to show that the Circuit Court of Appeals decided "a Federal question in a way probably in conflict with applicable decisions of this Court". To the contrary, it appears that the decision of the Circuit Court was in conformity with and supported by decisions of this Court.

And, with respect to their contentions as to being employees of respondent it is clear that they would have this Court review the findings of the District Court, sitting as a jury, upon conflicting testimony offered by the respective parties. In this attempt they fail to meet the burden cast upon them under Rule 52A of the Federal Rules of Court Procedure.

The petition should, therefore, be denied.

Respectfully submitted,

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